No. 91-1146

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNIONAMERICA INSURANCE COMPANY LTD. and CONTINENTAL REINSURANCE CORPORATION (U.K.) LIMITED, *ET AL.*,

Petitioners,

—against—

STATE OF CALIFORNIA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

Petitioners in No. 91-1146 (the "Unionamerica petition") submit this response to the Solicitor General's brief on behalf of the United States as *amicus curiae* ("U.S. Br."). The Unionamerica petition seeks review of the Ninth Circuit's determination that plaintiffs have antitrust standing to challenge alleged restraints in the London reinsurance and retrocessional reinsurance markets.

The Solicitor General recognizes that "[t]his is a complex and important case." U.S. Br. 6. He recognizes error in parts of the Ninth Circuit's analysis, U.S. Br. 7, and he does not dispute that, contrary to the Ninth Circuit's holding, directness and antitrust injury are separate and necessary requirements of antitrust standing.[1] Nor does the Solicitor General deny that, as several Courts of Appeals have remarked, this Court's discussion of directness and antitrust injury in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), "has bred much confusion in the lower federal courts." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1451 n.20 (11th Cir. 1991). *See also Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988); *Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1201 (7th Cir. 1986); Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1512 (1985). *See* Pet. 10-15; Reply Br. 2-3.[2]

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1 For a demonstration of the operation of antitrust injury and directness as independent requirements of antitrust standing, *compare Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (antitrust injury), *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (antitrust injury), and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S 477 (1977) (antitrust injury) *with Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807 (1990) (to be reported at 497 U.S. 199) (directness), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (directness).

2 The Unionamerica petition is cited as "Pet. _____"; the appendix to the Unionamerica petition, as "Pet. App. ____"; the Unionamerica petitioners' reply brief as "Reply Br. ____."

The Solicitor General nonetheless opposes review based on his observation that (1) petitioners do not contest the sufficiency of the allegations of antitrust injury, and (2) "the court of appeals expressly found that '[t]he injury alleged was direct.' " U.S. Br. 22 (citing Pet. App. A20). Thus, the Solicitor General argues, application of the test proposed in the Unionamerica petition would not alter the Ninth Circuit's result.

This basis of opposition, however, fails to come to terms with a central argument raised by the Unionamerica petition. The Ninth Circuit "found" directness of injury even while acknowledging that the consequences of which plaintiffs complain only "took effect through" at least one intervening market and intervening class of economic actors. Pet. App. A20. The court's "finding" thus removes all meaning from the directness requirement. The justifications the Solicitor General offers for the Ninth Circuit's conclusion as to directness neither support the holding nor diminish the mischief that the holding will cause.

First, while recognizing that the only named defendants in the counts subject to the Unionamerica petition are reinsurers, retrocessional reinsurers and brokers who operate in markets in which plaintiffs neither purchase nor compete, the Solicitor General points out, without further explanation, that those counts also refer to "unnamed co-conspirators." U.S. Br. 22 (citing Pet. App. A141-A147). However, an antitrust plaintiff must allege and eventually prove facts sufficient to establish its standing. *See, e.g., Cargill*, 479 U.S. at 110 & n.5. A plaintiff cannot meet that burden simply by including in the complaint a reference to unidentified co-conspirators whose role in the alleged conspiracy or position in particular markets is left unexplained. Such an allegation provides no means by which a court could satisfy itself that plaintiff could prove the requisite connection between its alleged injury and the conduct of the alleged wrongdoers. *Associated General Contractors*, 459 U.S. at 535.

Second, the Solicitor General suggests that plaintiffs have alleged a "direct injury" because "the complaints allege an intent to affect the availability of primary insurance to respondents." U.S. Br. 22 (citing Pet. App. A141-A147). Even were that true of the reinsurer-only conspiracies alleged in the counts subject to the Unionamerica petition, this Court has already made clear that "an allegation of improper motive . . . is not a panacea that will enable any complaint to withstand a motion to dismiss." *Associated General Contractors*, 459 U.S. at 537. The motive allegation simply is not "of controlling importance." *Id.* at 537 n.37.

The Solicitor General's principal arguments, therefore, fail entirely to address a fundamental, and dangerous, error in the Ninth Circuit's analysis: the failure to require allegations from which directness of injury can fairly be inferred. The London reinsurance claims assert a chain of causation that leads from alleged London-based reinsurance and retrocessional reinsurance conspiracies *through* other reinsurers and primary insurers and only then to plaintiff consumers. Pet. App. A128-A133, A141-A147, A20. This course of causation cannot be reconciled with this Court's definitions of directness. Moreover, the Ninth Circuit's error most plausibly results from, and is likely to be repeated because of, the use of a single balancing test for antitrust standing rather than the clearer, distinct tests for injury and directness implicit in this Court's decisions. *See* Pet. 10-15.

Finally, the Solicitor General argues that the Ninth Circuit's result can be validated by reference to this Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), a case neither discussed nor cited by the Ninth Circuit. The Solicitor General's principal discussion of *McCready* and his efforts to distinguish *Illinois Brick* appear in his treatment of the petition of Winterthur Reinsurance Corp. (No. 91-1131). U.S. Br. 18-21. That petition addresses claims in which "Winterthur is alleged to have conspired with primary insurers to restrict the availability of *primary* insurance to respondents."

U.S. Br. 19 (emphasis in original) (citations omitted). Indeed, the very premise of the Solicitor General's discussion of *McCready* and *Illinois Brick* is the alleged participation of Winterthur in a conspiracy with entities that dealt directly with plaintiffs.[3] Because there is ~~no~~ dispute that the London reinsurance claims which are the subject of the Unionamerica petition do not name as conspirators any entities from which plaintiffs might have purchased or with whom they might have competed, the Solicitor General's treatment of *McCready* and *Illinois Brick* is not germane to the issues raised here.

Unlike the plaintiffs in the London reinsurance claims, the plaintiff in *McCready* participated in the directly restrained market. As the *McCready* Court described the conspiracy, the physicians and psychiatrists for whom Blue Shield served as agent sought to preserve for themselves the market for psychotherapeutic services in which Carol McCready was a consumer. 457 U.S. at 469 n.4, 478-80. By contrast, in the claims subject to this petition, plaintiffs allege that reinsurers conspired to set the terms on which retrocessional insurance and reinsurance would be made available to reinsurers and primary insurers. Plaintiffs do not allege that they purchase retrocessional insurance or reinsurance or otherwise participate in reinsurance markets.

Moreover, regardless of whether the plaintiff in *McCready* participated in the directly restrained market, she was "the direct victim of unlawful coercion." *Associated General Contractors*, 459 U.S. at 540 n.44. In order to achieve their goal of excluding psychologists, the conspirators acted directly on Ms.

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3 *See, e.g.*, U.S. Br. 20 (unlike *Illinois Brick*, "this case [involves] a two-level conspiracy to affect the terms on which primary insurers will sell insurance to consumers"), 21 ("*Illinois Brick* has little application" where, " '[a]lthough the [reinsurer] did not sell directly to the consumer, [it] is a fellow conspirator with the direct-selling [primary insurer] and therefore jointly and severally liable . . . for the consumer's injury' " (initial brackets added; remaining brackets and ellipsis in U.S. Br.) (citation omitted)).

McCready by denying her reimbursement of the cost of her psychotherapeutic treatment. *McCready*, 457 U.S. at 479. She was the fulcrum on which the alleged restraint directly turned. *See, e.g., Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 (6th Cir. 1983). Here, again in stark contrast, plaintiffs do not complain of any coercion directly imposed upon them by the reinsurers they seek to sue in the London reinsurance claims.[4]

In short, unlike the situation in *McCready*, the London reinsurers did not need to coerce, and are not alleged to have coerced, plaintiffs in order to achieve their unlawful goal. The reinsurers are alleged to have acted directly only on primary insurers and other reinsurers. Even if such actions eventually had an effect on plaintiffs as consumers in the primary insurance market, and were intended to have such an effect, that effect would be the same kind of indirect, legally insufficient effect alleged in *Utilicorp*. If the directness requirement is not satisfied even where, as in *Utilicorp*, customers of a regulated utility alleged that the utility had purchased price-fixed gas from the conspirators and passed the entire cost on to them, it cannot be satisfied by these plaintiffs' allegations. *See Utilicorp*, 110 S. Ct. at 2817; *see also Illinois Brick*, 431 U.S. at 745-46.

Indeed, the teaching of *Illinois Brick* and *Utilicorp* squarely applies to the reinsurer-only counts subject to this petition. Plaintiffs acknowledge that they sue only as consumers of primary insurance, that reinsurance is a product purchased only by

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4 The Solicitor General observes that "[j]ust as the boycott in *McCready* made the services of psychologists (and health insurance to pay for those services) unavailable to consumers, so the alleged reinsurance boycott in this case made desired forms of insurance unavailable to consumers such as the plaintiffs." U.S. Br. 20 (citing 457 U.S. at 478-80). But that analogy misses the point of the directness inquiry, which is not concerned with the nature of the injury alleged by the plaintiff (the subject of the antitrust injury inquiry), but with the chain of alleged events by which the injury was purportedly caused and the place of plaintiff and defendant, respectively, along that chain.

primary insurers, and that retrocessional reinsurance is purchased only by reinsurers. Thus, unlike *McCready*, the London reinsurance claims involve a vertical chain of distribution analogous to those underlying *Illinois Brick* and *Utilicorp*, and the counts subject to this petition allege conspiracies one step or even two steps removed from the consumer plaintiffs. Pet. 6-8. These counts therefore threaten precisely the difficulties that the directness requirement is intended to prevent—speculative theories of causation and damages, the burden of complex apportionment, and the risk of duplicative recovery. *Utilicorp*, 110 S. Ct. at 2813-15; *Associated General Contractors*, 459 U.S. at 542-45; *Illinois Brick*, 431 U.S. at 730-33, 745-46.[5]

Given the importance of private antitrust enforcement and, at the same time, the high cost of overdeterrence, this Court should provide clear, readily applicable standards by which the federal courts can determine when a potentially massive antitrust action may go forward. The Ninth Circuit's use of a balancing test and evisceration of the directness requirement will allow inefficient enforcers of the antitrust laws to pursue treble damages. The continuing confusion of directness and antitrust injury will yield inconsistent and unpredictable

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5 The allegedly restrained London reinsurance market is only one of several sources available to primary insurers and reinsurers seeking reinsurance or retrocassional insurance coverage, Pet. App. A116, and reinsurance and retrocassional insurance typically covers only a part of the portfolio of risks insured by the ceding carrier, Pet. App. A109, A161-A162. As a result, in order to prove damages, plaintiffs would have to reconstruct—and inevitably speculate about—innumerable decisions by other actors, including individual reinsurers, primary insurers, and insureds, concerning to what extent and on what terms they would obtain coverage. Unsurprisingly, the Ninth Circuit expressly acknowledged that the reinsurer-only claims would give rise to "a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers, and there is a danger of duplicative recovery." Pet. App. A20. *See* Pet. 18-19.

results. This Court should grant this petition in order to provide the guidance that is needed to avoid these consequences.

Respectfully submitted,

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